

**In the United States Court of Appeals  
for the Ninth Circuit**

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**BERNARD BLOCH, APPELLANT**

*vs.*

**UNITED STATES OF AMERICA, APPELLEE**

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*On Appeal from the Judgment of the  
United States District Court for the District of Arizona*

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**APPELLANT'S PETITION FOR REHEARING**

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Bernard Bloch, Appellant, respectfully requests and petitions this Court for a rehearing of this cause on the following grounds and for the following reasons:

This Court erred in that part of its opinion passing upon Appellant's Specification of Error No. IV. This Specification charges that prejudicial error was committed when the Assistant United States Attorney asked the defendant:

“Have you ever been convicted of a felony?”

The answer was:

“Yes, but it is up on appeal”.

The defendant had been convicted on one count of an indictment, which case was then on appeal and subsequently was reversed by this Court.

Bloch vs. United States  
223 Fed. 2d 297.

This Court, in discussing Specification of Error No. IV, stated that a majority of the State Courts allow such a question even when the prior conviction is on appeal. That is true. However, there is a diversity of opinion in the State Courts and there is also an apparent conflict in the Federal Courts, one Federal case holding the question to be proper.

United States vs. Empire Packing Company  
174 Fed. 2d 16.

The above case, however, was in a trial without a jury and can hardly be held to be binding upon the Courts of another circuit in a case tried before a jury.

The other Federal case held that the question was not proper impeachment and that the Court erred in admitting such evidence.

Campbell vs. United States;  
176 Fed. 2d 45.

We respectfully submit that the rule in the Campbell case announces a sound principle of law that this Court should have followed in the present case.

This Court, in substance, held that the prosecutor acted in good faith and that, in view of the diversity of opinions, he was justified in concluding that the question was proper and well within the bounds of propriety. Such a conclusion by this Court leaves the propriety of the question judicially undecided insofar as this jurisdiction is concerned and leaves it up to each United States Attorney to determine the line of authority he will follow should the question arise in his District.

We are not primarily concerned with the good or bad faith of the prosecutor and, in determining the merits of Specification of Error No. IV on that basis, we are misinterpreting the purpose of the Specification. The Specification not only mentions misconduct but it directly charges that "prejudicial error was committed by \* \* \* the United States Attorney in asking the defendant if he had ever been convicted of a felony".

If prejudicial error was committed it is immaterial, in so far as the damage to Appellant is concerned, whether the error was committed intentionally or innocently and in good faith.

Let us consider whether the question was prejudicial. The Government's case rested almost solely upon the testimony of the witness Cantu.

The defense rested upon the testimony of the defendant, Dr. Bloch.

The testimony of these two witnesses, in so far as most of the material facts are concerned, was very definitely

contradictory. The verdict of the jury would necessarily depend upon which witness they believed. Under such circumstances the impeachment of one of the witnesses would obviously be very damaging.

There is no doubt that the question was propounded for the purpose of impeaching Dr. Bloch. The verdict indicates that the attempt was successful.

This case cannot be disposed of by saying that the jury resolved the disputed testimony against the defendant. The query is immediately suggested: Would the verdict have been the same had not the testimony of Dr. Bloch been weakened by the question as to his prior conviction?

Prejudice is so apparent that this Court should take notice of the error even though not properly raised at the trial.

18 U. S. C. A.

Federal Rules of Criminal Procedure 52

This Court should determine the propriety or impropriety of the question asked this defendant.

If, as this Court says in its opinion, there is a diversity of opinions in both State and Federal Courts, then this Court should say which line of authority we are to follow in this jurisdiction.

We respectfully submit that this Petition for a Re-hearing should be granted.

*Respectfully submitted,*

FRANK E. FLYNN  
*Attorney for Appellant*  
202 Arizona Title Building  
Phoenix, Arizona

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that in his judgment the foregoing Petition for Rehearing is well founded and meritorious and that it is not interposed for delay.

FRANK E. FLYNN  
*Attorney for Appellant*  
*and Petitioner*

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**APPLICATION FOR STAY OF ISSUANCE OF MANDATE**

In the event this Petition for Rehearing should be denied it is the purpose and desire of Appellant to apply to the Supreme Court of the United States for the issuance of a Writ of Certiorari and for that reason application is hereby formally made for a stay of the issuance of mandate by this Honorable Court pending the presentation and determination of such Petition for Writ of Certiorari.

**FRANK E. FLYNN**  
*Attorney for Appellant  
and Petitioner*